( FEDERAL MARITIME COMMISSION )
( SERVED OCTOBER 2, 1990 )
( EXCEPTIONS DUE 10-24-90 )
(REPLIES TO EXCEPTIONS DUE 11-15-90)

FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 1873

APPLICATION OF NEDLLOYD LINES (U.S.A.) CORP.
FOR THE BENEFIT OF ATLAS POWDER CO.

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Application for permission to waive collection of $17,211.67, which, as corrected, is really an application seeking permission to refund $16,374.28 to the shipper, denied.

Applicant carrier negotiated a rate with the shipper and requested its conference to file the rate, which the conference did, but the shipper or its freight forwarder, contrary to the advice of the applicant, made the mistake of booking the shipment on an earlier sailing before the negotiated rate could go into effect.

Applications under the special-docket law can only be granted in cases of carrier error in tariff-filing, not, as in the instant case, when the mistake is in booking and is committed by the shipper or its agent.

*J. Th. Teeuw* for applicant.

INITIAL DECISION[1] OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

By application filed August 16, 1990, Nedlloyd Lines, Inc. seeks permission to waive collection of $17,211.67 in connection with a shipment of mining machinery which Nedlloyd

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[1]This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

carried from Norfolk, Virginia to Tanunshede, Sweden on a ship sailing from Norfolk on June 11, 1990. The requested waiver would benefit the shipper, Atlas Powder Company, located in Dallas, Texas. Although the application states that Nedlloyd is seeking to waive collection of this additional amount, the evidence it has submitted shows that the shipper paid freight under the higher applicable rate in the tariff and that the applicant is really seeking permission to refund the amount stated above to the shipper.[2] However, for the reasons explained below, I find that the application does not qualify under the special-docket law and must be denied essentially because the mistake that occurred did not involve a carrier's making a tariff-filing error but rather appears to involve a mistake on the part of the shipper or its agent, the freight forwarder.

The application is supported by the sworn explanation of Mr. J. Th. Teeuw, President of applicant's agent, Nedlloyd Lines (U.S.A.) Corp., and by a number of documents consisting of telexes, tariff pages, bill of lading, invoice, and proof of payment. Mr. Teeuw explains that Nedlloyd is a member of the USA-North Europe Rate Agreement (the Rate Agreement), which publishes and files rates for its members in a common tariff. He further explains that on June 7, 1990, one of Nedlloyd's solicitors in its Portsmouth, Virginia office contacted its Atlanta office. According to the telex from the Portsmouth agent, the shipper had booked two 40-foot high-cube containers with Nedlloyd for an expected sailing on the vessel *Sea-Land Commitment* apparently scheduled to sail from Norfolk on June 11 or 12, 1990. The agent advised that the shipper, through its freight forwarder, Schenkers

[2]Nedlloyd has submitted proof that the freight forwarder has paid freight under the higher applicable tariff rate and has been billed for a container service and inland carrying charge accruing in Sweden. (See Exhibits Nos. 6 and 7.) These two Swedish charges do not appear to be affected by the purported tariff error and should therefore not be included in the calculation of any refund being requested. If calculated by reference to ocean freight and charges applicable on the U.S. end of the shipment, the total refund would be $16,374.28 ($22,755.48 less $6,381.20) instead of $17,211.67. However, as the application cannot be granted, these amounts are academic.

International, was requesting that Nedlloyd charge a rate that would be competitive with another carrier, such as a per-container rate, rather than the high measurement rate that was in effect for Nedlloyd on the commodity. (See Exhibit No. 2.) The Atlanta office was agreeable to the request and on the same day (June 7, 1990) sent a request to the Rate Agreement under the Agreement's expedited Rate Initiative Program under which a telephonic poll of the members of the Agreement would be conducted and an answer would be obtained within 48 hours. Nedlloyd asked for approval of a per-container rate of $2140 (subject to additional applicable charges) and advised that the shipment was ready to go forward on a vessel sailing during the week of June 10, 1990. (See Exhibit No. 3.) The Rate Agreement approved the requested rate for an effective date of June 13, 1990, but at Nedlloyd's request, the rate was filed in the tariff effective June 12, 1990.

Meanwhile, Nedlloyd, expecting difficulty in obtaining the necessary approval of the Agreement members, had requested that the booking of the shipment be delayed for the next vessel sailing the following week. This request was not acted upon by the shipper or its forwarder because of what Mr. Teeuw describes as a "breakdown in communication between Nedlloyd Lines, Atlas Powder Co., and their forwarder Schenkers International . . . which resulted in the cargo being shipped on June 11, 1990 on the Sealand Commitment . . . the day before the agreed upon reduced rate . . . went into effect." (Statement of Mr. Teeuw, application, page 4.) Applicant states that "[t]his has resulted in an extraordinary expense to the Shipper, an expense which was not due to their error. It is the position of Nedlloyd Lines that the inadvertence as described herein is of the type within the scope of Section 8(e) of the Shipping Act 1984 and Rule 92(a) of the Commission's Rules of Practice and Procedure. . . ." (*Id.*)

The application containing the explanation of the mistake described above presented several problems, one technical and the other serious and substantive. Technically Nedlloyd was supposed to serve a copy of its application on the Rate Agreement, as required by the Commission's regulation (46 CFR 502.92(a)(3)(i)). More importantly, the explanation of the mistake appeared to show that it was not Nedlloyd or the Rate Agreement that had committed any tariff-filing error but rather that the shipper or its agent, the freight forwarder, had failed to heed Nedlloyd's request that the shipment be booked one week later. Under such circumstances, the Commission has consistently denied applications. Accordingly, I wrote to applicant advising it to serve a copy of the application on the Rate Agreement and to furnish evidence showing that the error was that of Nedlloyd concerning tariffs rather than simply a booking error. (See letter to Mr. Teeuw, dated August 30, 1990.) However, I have received no reply to my letter.

*Discussion and Conclusions*

It is always regrettable to have to deny an application under the special-docket law and regulation which are remedial and are supposed to relieve shippers of the consequences of tariff-filing errors committed by carriers. However, when it appears that the error is not the error of a carrier relating to the carrier's tariff, the law does not permit the Commission to authorize a carrier to deviate from its tariff in effect at the time of shipment. Unfortunately, the record presented to me indicates that the mistake in question was not that of the carrier applicant nor did it concern an error in tariff-filing. Rather it appears that someone on behalf of the shipper failed to change the booking of the subject shipment so that it would sail on the following week at a time when the newly reduced rate would

be in effect. This type of error is not chargeable to the carrier and is not the type of error that the special-docket law was enacted to remedy. If anything, it appears that the error was committed by the shipper or its agent, the freight forwarder, and that the error was committed despite the attempts of the carrier to prevent it from occurring.

The law which authorizes relief in special-docket cases was enacted in 1968 as P.L. 98-298, 82 Stat. 111. It is found today in section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e). The purpose of the legislation was to relieve shippers and consignees of unintended additional freight costs resulting from the bona fide mistakes of carriers who had either inadvertently failed to file rates which they had negotiated with shippers in their tariffs prior to shipments or who had committed clerical or administrative mistakes which caused their tariffs to contain errors at the time of shipment. See discussion in *Farr Co. v. Seatrain,* 20 F.M.C. 411, 414-417, reconsideration denied, 20 F.M.C. 663, 664-665 (1978); *U.S. Dept. of Agriculture v. Waterman S.S. Corp.,* 20 F.M.C. 644, 650-651 (1978); *Application of GEFA and Sea-Land for SDS Biotech,* 23 SRR 401, 403-404 (I.D. 1985, adopted in relevant part, 23 SRR 786 (1986)).

The special-docket law is undeniably remedial in nature, and the Commission has stated time and again that it will interpret it broadly in order to achieve its remedial purposes. See discussion and cases cited in *Application of Columbus Line, Inc. for the Benefit of Hexagon Laboratories,* 24 SRR 208, 209 (I.D., F.M.C. notice of finality, June 29, 1987). No matter how remedial the statute may be, however, an agency cannot expand its authority beyond what Congress has conferred on it. (*Id.*, citing *Austasia Intermodal Lines v. Federal Maritime Commission,* 580 F.2d 642, 646-647 (D.C. Cir. 1978).) Therefore, as the Commission has stated, "It is not every case of mistake which this statute is designed to cover." (*Farr Co. v. Seatrain,* cited above, 20 F.M.C. at 415.) See also *Biotech,* cited above,

23 SRR at 403. ("As the legislative history to P.L. 90-298 shows, however, not every error committed by a carrier would be corrected by the remedial legislation.") Thus, the Commission has denied applications which involved mistakes other than tariff-filing or tariff printing, i.e., it has denied applications involving mistakes such as misquotations, misreadings, or misinformation about tariff rates, mistakes of business judgments, mistakes of shippers, and operational mistakes, such as those occurring when the carrier loads a shipment at the wrong time. See discussion and cases illustrating these non-tariff errors cited in *Application of Columbus Line,* cited above, 24 SRR at 209-210.

Among the various types of non-tariff errors that have occurred which do not qualify for relief under the special-docket law are those mistakes involving operational errors or errors committed by shippers. An operational error occurs when a carrier loads a shipment on a wrong, earlier sailing or on a wrong ship or furnishes the wrong equipment, and these mistakes cause the shipment to be subjected to higher rates in the tariffs effective at the time of the shipments. These mistakes are regrettable but they are not tariff-filing errors, and in such cases the Commission has had to deny the applications. See *Biotech,* cited above, 23 SRR 786 (carrier's operations department loaded shipment for wrong, earlier sailing before new rate could go into effect); *Application of Hapag-Lloyd for the Benefit of Clouston Foods,* 24 SRR 1650 (I.D., F.M.C. notice of finality, February 6, 1989) (carrier caused ship to sail sooner than scheduled, before negotiated rate went into effect); *Application of Martin Brothers International, Inc. for the Benefit of Same,* 24 SRR 1489 (I.D., F.M.C. notice of finality, January 1, 1989) (carrier furnished 40-foot container instead of the 20-foot container that shipper had requested).

An error committed by the shipper also does not qualify for relief under the special-docket law. See, e.g., *Homasote Co. v. United States Lines, Inc.,* 19 F.M.C. 89 (1976)

(shipper neglected to ask carrier to file special reduced rate); *Application of Moore McCormack for the Benefit of Celanese Corp.*, 21 SRR 1106 (I.D., F.M.C. notice of finality, September 7, 1982) (shipper failed to request conference to extend rate beyond expiration date); *Application of the Inter-American Freight Conference for the Benefit of RCA Corp.*, 22 SRR 1572 (I.D., F.M.C. notice of finality, February 13, 1985) (shipper neglected to negotiate new rate after notice of expiration of previous rate). In these shipper-committed-error cases, the Commission had to deny the applications even though denial meant that the carriers were not allowed to refund substantial sums of money to the shippers, $28,807 in the *RCA* case and $10,600 in the *Celanese* case, for example.

Still other decisions of the Commission illustrate why the law does not authorize the Commission to permit refunds to shippers when it was not a carrier's tariff-filing error that caused the problem but something else. For example, in *Application of TWRA and Sea-Land Corporation for the Benefit of Bruce International,* 23 SRR 1693 (1987), the Commission denied an application seeking to waive collection of freight charges in the amount of $32,130.31 because there was no tariff-filing error committed by the conference involved but rather reliance by the shipper on misinformation about the filing of a rate in the conference's tariff. In that case, the Commission found that the carrier member of the conference could not have filed the rate in time for the shipment involved because of the conference's 10-day rule and also found that the shipper had advanced the booking of the shipment before the new rate could go into effect because of reliance on misinformation provided by the conference and carrier. The Commission stated that "[u]nder these circumstances, where the carrier is unable to file or obtain a filing of a proposed rate by a certain time, the mere intent to have that rate on file does not of itself create an error in the tariff." (*Bruce International,* cited above, 23 SRR at 1696.) As to the fact that the

shipper had booked the shipment too soon and before the negotiated rate could go into effect in reliance on misinformation about the tariff rate, the Commission stated (23 SRR at 1697):

> However, the fact that the shipper acted in reliance on the erroneous information did not affect the validity of the rate on file. In this instance [the conference's], verbal notification that the [negotiated] rate was approved May 14, 1983 amounted to a misquotation of the applicable rate. Misquotations or incorrect information concerning rates and charges have been held to be irrelevant to the shipper's obligation to pay the rate on file.

As to the question whether the conference, whose tariff was involved, had intended to file a different rate before the shipment but had committed an error by failing to carry out its intent, the Commission stated (23 SRR at 1696):

> TWRA's [i.e., the conference's] refusal to approve the [negotiated] rate makes the rate on file on May 15, 1985 the rate TWRA intended to be applied to the shipment. Under these circumstances no inadvertent failure to file the intended rate may be attributed to TWRA, by whose tariff Sea-Land was bound by virtue of its membership in the Conference, or, for that matter, to Sea-Land.

Even if Nedlloyd had advised the shipper in the instant case that the negotiated rate would definitely be filed in the tariff before the June 11 sailing, which Nedlloyd did not do, there is some authority indicating that the shipper would have been at fault in not verifying the filing before booking the shipment. In the recent case decided by the Supreme Court, *Maislin Industries, U.S. v. Primary Steel, Inc.,* 110 S.Ct. 2759 (1990), the Supreme Court held that the filed rate at the time of shipment had to be charged notwithstanding the shipper's reliance on the carrier's representation that a lower rate would be filed. The Court noted, among other things, that the shipper "could also require proof from a carrier that the negotiated rates had been filed before tendering the shipment, especially since there are

commercial services providing up to the minute details of the carrier's rate schedule." (110 S.Ct. at 2769 n. 12.)

It is clear from a reading of the cases cited above that the instant application does not qualify under the special-docket law for the reason that neither Nedlloyd nor the Rate Agreement can be found on the facts presented to have made a tariff-filing error. The record in the instant case shows that the Rate Agreement took exactly the action that it was requested to take, namely, to file the negotiated rate of $2140 per container on mining machinery by June 12, 1990. It was not Nedlloyd's or the Agreement's fault that the subject shipment moved too soon to enjoy the benefit of the new rate. Rather the record indicates that the shipper or someone acting on its behalf, i.e., the freight forwarder, failed to heed the advice of Nedlloyd to postpone the shipment until the following week. It is not clear why or how these people failed to heed Nedlloyd's request to delay the booking. Applicant merely states that Nedlloyd made the request but that there was a "breakdown in communication." However, as seen from the cases cited above, especially *Bruce International* and *Maislin*, for special-docket purposes it does not matter whether Nedlloyd misinformed the shipper or forwarder as to the status of the tariff rates at the time of booking. In short, there was no tariff-filing error shown on this record. Rather it appears from the facts presented that the shipper or forwarder jumped the gun by booking the shipment one week too soon. The special-docket law does not authorize departure from applicable tariff rates when there is no tariff-filing error or when the error is that of the shipper, as in the instant case.

For the above reasons, I must regretfully conclude that Nedlloyd cannot refund $17,211.67 in freight money to the shipper. In so concluding, I quote from a Commission decision in which another jurisdictional defect, namely, failure to file the corrective, new

tariff prevented the Commission from granting the application even when the carrier had made an error, unlike the instant case. The Commission stated in this regard in *A.E. Staley Mfg. Co. v. Mamenic Line,* 20 F.M.C. 642, 643 (1978):

> This requirement cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested.

Norman D. Kline
Administrative Law Judge

Washington, D.C.
October 2, 1990